OPINION OF ADVOCATE GENERAL MISCHO

delivered on 6 June 2002 [1]

1. This case raises questions concerning the interpretation of the provisions of the EC Treaty relating to freedom of establishment (in particular, Articles 43 EC, 46 EC and 48 EC) and the free movement of capital (in particular, Articles 56 EC and 58 EC).

I — The applicable national legislation

2. The first, second, third and eighth paragraphs of Section 3(1)(h) of the Lagen (1947:576) om statlig inkomstskatt (Law on State Income Tax, hereinafter 'SIL') provide as follows:

'A transfer of an asset, to which the rules in Sections 25 to 31 apply, without consideration to a Swedish limited company in which the transferor or his kin directly or — unlike the case described in the second sentence of the third paragraph — indirectly holds shares shall be treated as though the asset were disposed of for a consideration equivalent to cost. The same shall apply to a transfer for a consideration which is less than both the market value of the asset and cost. If the market value is less than cost, the asset in that case shall be deemed to have been disposed of for a consideration equivalent to market value.

If no consideration is paid, the combined cost of the shares of the transferor and his kin in the limited company shall be increased by an amount equivalent to the cost of the asset or, in the case described in the third sentence of the first paragraph, the market value. If consideration is paid, the cost shall be increased by the difference between the cost or market value and the consideration.

A transfer of an asset to which the rules in Sections 25 to 31 apply, for no consideration or for a consideration which is less than the market value of the asset, to a

1 — Original language: French.

foreign legal person in which the transferor or his kin directly or indirectly has a holding shall be treated as though the asset were disposed of for a consideration equivalent to the market value. The same shall apply in the case of a transfer to a Swedish limited company in which such a foreign legal person either directly or indirectly has a holding.

...

An asset which, under the first or third paragraph, is to be considered to have been disposed of for a certain consideration shall, in application of the kommunalskattelagen (1928:370) and this law, be deemed to have been acquired for the same consideration by the purchaser.'

3. According to the national court, these provisions were adopted in 1998 and in 1999 with a view to regulating more closely the way in which contributions (transfers without consideration or at undervalue) to companies of, *inter alia*, shares are dealt with for tax purposes.

4. Again according to the national court, to sum up, these rules mean that the difference between market value and acquisition value is taxable if the transfer is to a foreign legal person or to a Swedish company in which such a person either directly or indirectly has a holding. However, if the transfer is to a Swedish company with no foreign ownership there is no immediate taxation. In such cases the amount of the difference is typically seen as subject to tax when the transferor disposes of his shares in the company to which the holding was transferred. Thus, as a rule taxation is deferred until the holder's property is ultimately disposed of.

5. The national court also points out that the difference for tax purposes between contributions made to companies which are taxable in Sweden and those which are not is explained in the *travaux préparatoires* for the SIL on the basis of the risk of the Swedish tax system being deprived of a source of revenue. That could happen, for instance, if a proprietor of a limited company, before leaving Sweden, transferred his shares in the company at undervalue to a foreign company which he also owned. Originally, the rules in the third paragraph of Section 3(1)(h) of the SIL only covered transfers to foreign legal persons. However, in the course of the subsequent work on the legislation it came to be seen that a form of tax disadvantage could occur through the proprietor's transferring his shares in a company to a Swedish company which was a subsidiary of the foreign company he

owned. The rules were therefore amended so as to cover transfers both to foreign legal persons in which the transferor or his kin directly or indirectly had a holding and to a Swedish legal person in which such a foreign legal person directly or indirectly had a holding.

6. Finally, the national court notes that from the 2002 tax year (income earned in 2001) income tax law 1999:1229 will apply in place of the SIL. That law contains provisions identical to those of the SIL that are relevant to the present case.

II — Facts in the main proceedings and the question referred for a preliminaryruling

7. X and Y, natural persons of Swedish nationality, have applied for a preliminary decision from the Skatterättsnämnden (Revenue Law Commission) concerning the application of the share transfer provisions of Section 3(1)(h) of the SIL.

8. The purpose of the Swedish system of preliminary decisions on tax matters is to give an individual a decision as to how a certain matter, which is of importance to that individual, should be interpreted for tax purposes.

9. In the present case, the request for a preliminary decision concerned the tax implications of the transfer by X and Y of their shares in X AB, a Swedish company, to Z AB, another Swedish company, which was in its turn a subsidiary of Y SA, a Belgian company.

10. X AB is the parent company in a group currently owned in equal shares by x and Y and a Maltese company. X and Y have no proprietary interest in this latter company. Y SA is also a parent company owned by the present owners of X AB. On a restructuring of the group, x and Y deemed it expedient to transfer certain activities to Y SA.

11. In their application, X and Y raised, *inter alia*, the question whether the difference in the tax implications depending on whether the shares were transferred to a Swedish company without foreign owners [first paragraph of Section 3(1)(h) of the SIL] or to a Swedish company with such owners [second sentence of the third paragraph of Section 3(1)(h) of the SIL] could be sustained, both in the light of the provisions of the double taxation treaty between the Kingdom of Sweden and the Kingdom of Belgium and the provisions of the EC Treaty concerning freedom of establishment and free movement of capital.

12. In its preliminary decision, delivered on 27 September 1999, the Skatterättsnämnden held that the transfer of shares in X AB should be treated as a transfer for consideration equivalent to market value and that X and Y should thus be taxed on a gain equivalent to the difference between the market value of the shares and their acquisition cost.

13. The Skatterättsnämnden also held that freedom of establishment was not at issue and, as regards free movement of capital, that the exception in Article 58(1)(a) EC was applicable.

14. X and Y appealed against this decision to the Regeringsrätten (Supreme Administrative Court) claiming, *inter alia*, that the Regeringsrätten should declare that the transfer should be taxed on the basis of the proposed transfer price.

15. Before the Regeringsrätten, X and Y argued essentially that the different, much less advantageous tax treatment of Swedish companies in which the transferor had a holding through a foreign legal person in which he also had a holding constituted a clear obstacle both to the free movement of capital (Article 56 EC) and to freedom of establishment (Article 43 EC).

16. It is against that background that the Regeringsrätten decided to refer the following question to the Court for a preliminary ruling:

'In a situation such as that in the present case, do Articles 43, 46, 48, 56 and 58 EC preclude the application of a Member State's legislation which — like the relevant Swedish legislation — has the effect that a capital contribution in the form of a transfer of shares at undervalue is taxed less advantageously if the contribution is to a legal person which is domiciled in another Member State and in which the transferor directly or indirectly has a holding or to a domestic limited company in which such a legal person has a holding, than would have been the case if there had been no such foreign proprietorial interests?'

III — Assessment

Admissibility of the question referred

17. The Commission points out that this case concerns only a hypothetical situation, since the transfer contemplated by X and Y, which forms the subject of their appli-

cation to the administration, has not yet taken place. It adds, however, that since an action is pending before the national court and the Court has at its disposal sufficient information for a preliminary ruling, the question posed should receive an answer.

18. I share this view.

19. In fact, the Court has already had occasion, in a similar case,[2] to rule on the way in which the preliminary decision procedure followed in the main proceedings should be assessed in the light of the criteria laid down in previous decisions concerning the conditions of application of Article 234 EC. On that occasion it held that the fact that the transaction envisaged by the applicants in the main proceedings had not yet taken place did not preclude the existence of a genuine dispute before the national court.

20. The same line of reasoning should be followed in the present case. Far from being called upon to rule on a hypothetical problem, the Court has been invited to interpret rules of Community law that are to be applied to a genuine dispute and it is clear from the documents before the Court that it has sufficient information to give a helpful answer to the question submitted to it.

Existence of a restriction on freedom of establishment

21. The Riksskatteverket considers that the fundamental freedoms conferred by the Treaty have no bearing on this case since it concerns a situation internal to a Member State and cites the *Werner* judgment[3] in support. Thus, it takes the view that the present case concerns an amendment of the rules governing the pursuit of an economic activity in Sweden which, after the rules had been amended, continued to be pursued in that country.

22. However, the fact remains that this argument does not suffice to preclude the application of the rules of the Treaty in this particular case. It is clear from the order for reference that the tax treatment of the transaction in question depends on the existence of an element foreign to Sweden, namely the fact that the parent company or shareholders of the transferee company are established in another Member State. It is therefore apparent that the main proceedings cannot be considered to concern a purely domestic situation.

23. However, it is still necessary to determine the extent to which the Treaty rules are affected by the national measure at issue. According to the order for reference,

2 — Judgment of 18 November 1999 in Case C-200/98 *X and Y* [1999] ECR I-8261, paragraphs 15 to 23.

3 — Judgment of 26 January 1993 in Case C-112/91 [1993] ECR I-429.

this measure determines the tax treatment of transfers of assets to a company in which the transferor either directly or indirectly holds shares.

24. Any gains generated by such a transaction are subject to immediate taxation when the transferee company is a foreign legal person or a Swedish limited company in which that foreign legal person directly or indirectly has a holding.

25. On the other hand, if the transferee is a limited Swedish company without such a foreign legal person among its shareholders, then taxation is deferred. Clearly, this has cash-flow advantages for the transferor.

26. There can therefore be no doubt that, all other things being equal, a transfer to a Swedish limited company is accorded more favourable tax treatment than one made to a non-Swedish company or a Swedish company with foreign shareholders.

27. The Netherlands Government considers that, in the main proceedings, the freedom of establishment of X and Y in Belgium is at issue only to the extent that their holding in the Belgian parent company concerned is at a level sufficient to give them definite influence over that company's decisions and allows them to determine its activities within the meaning of the case-law of the Court. [4]

28. I share this view. The case-law [5] shows that the provisions of the Treaty concerning freedom of establishment are also applicable to national rules that could deter traders from the Member State concerned from establishing themselves in another Member State. The national rule at issue could in fact deter investors such as X and Y from exercising their right to establish themselves in another Member State by acquiring *significant* holdings in companies established there, since the treatment of transfers to such companies is less favourable than the treatment applicable to companies established in Sweden without foreign shareholders.

29. However, that is not the only restriction on freedom of establishment discernible in this case. As the Commission and the EFTA surveillance authority also point out, the national measure in question could also restrict the right of establishment in Sweden of a foreign company, such as the Belgian company in the main proceedings.

4 — Judgment of 13 April 2000 in Case C-251/98 *Baars* [2000] ECR I-2787.

5 — Judgment of 27 September 1988 in Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483.

Its freedom to invest and establish itself in Sweden and, in this particular case, to organise itself in different Member States, including Sweden, is restricted because in Sweden it would not be able to benefit from transfers, such as the transfer at issue, in the same way as a Swedish company without such a foreign company among its shareholders.

30. In these circumstances, the EFTA surveillance authority is also right to point out that the differential treatment in question could deter foreign companies from opening a secondary establishment in Sweden.

31. Moreover, the Court has held that a difference in treatment with respect to the moment at which tax becomes payable depending on whether or not the companies in question are resident in a given Member State is a restriction on freedom of establishment. [6]

32. It follows from the above that, in this particular case, we are confronted with such a restriction.

Justification of the restriction on freedom of establishment

33. Only the Riksskatteverket and, to a lesser extent, the Netherlands Government consider the national measure at issue to be justifiable.

34. The Riksskatteverket argues that the advantage enjoyed by Swedish companies, that is to say deferred taxation of the transfer, should be placed in the context of the tax treatment of capital gains. Thus, the granting of the advantage presupposes that the capital on which tax is thus deferred remains taxable in Sweden. If the transfer were made, directly or indirectly, to a foreign company, a subsequent transfer of the same shares by the latter could not be taxed in Sweden. This is why foreign companies are not allowed to benefit from the deferral of tax.

35. Citing, *inter alia*, as does the Netherlands Government, the judgment in *Bachmann*, [7] the Riksskatteverket considers that the difference in treatment can be justified, *inter alia* by the need to ensure the cohesion of the tax system and effective fiscal control. In principle, a Member State has the right to expect that sooner or later latent

6 — Judgment of 8 March 2001 in Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727.

7 — Judgment of 28 January 1992 in Case C-204/90 [1992] ECR I-249.

income will be taxable in the country in which it accrues. It is a matter of protecting its tax base and ensuring effective fiscal control, considerations which justify the restriction on freedom of establishment.

36. The Netherlands Government adds that, essentially, the present case is analogous to that which formed the subject of the *Bachmann* judgment, cited above. Both cases concern a temporary 'exemption' offset by subsequent taxation. In *Bachmann*, the 'exemption' took the form of a deduction of insurance contributions offset by the subsequent taxation of payments. If the latter could not be guaranteed, the 'exemption' was not granted.

37. In the present case, the (temporary) exemption would end with the eventual disposal of the shares held by the taxable person in the transferee company, when the gains exempted at the time of transfer would give rise to taxation.

38. According to the Netherlands Government, in the event of transfer to a company established abroad or to a Swedish company in which such a company holds shares, this eventual taxation is not guaranteed and therefore no temporary exemption should be granted. The tax debt is guaranteed only for as long as the transferor continues to reside in Sweden and is taxed there on his worldwide income. However, that would no longer be the case if he left Sweden. The foreign tax debt would not extend to the advantages obtained from shares in a company established abroad.

39. There is therefore, according to the Netherlands Government, a direct link between the temporary exemption and the subsequent taxation, which involves levying the same tax on the same taxable person but with deferral. This link would be dissolved if the taxable person were to leave the country. The cohesion of the system therefore requires that a Member State be allowed to take measures, such as the restriction at issue, to offset that risk.

40. The Netherlands Government also refers to the *Safir* judgment [8] in support of its argument that the aim of the Swedish tax system is to close a tax loophole by ensuring that, in all cases, tax is levied on capital gains accruing during the period of residence for tax purposes.

41. For its part, the Riksskatteverket also argues that, as the difference in treatment under the national measure concerned can be justified on the basis of the provisions of the Treaty relating to the free movement of

8 — Judgment of 28 April 1998 in Case C-118/96 [1998] ECR I-1897.

capital, *inter alia* Article 58(1) and (2) EC, it follows from the last sentence of the second subparagraph of Article 43 EC that the measure cannot be declared unlawful under Article 43 EC.

42. What are we to make of these various arguments?

43. As regards the argument that restrictions on freedom of establishment can be justified on the basis of the provisions of the Treaty relating to the free movement of capital, there can be no escaping the fact that it is inconsistent with the previous decisions of the Court.

44. The case-law shows[9] that, in those cases in which the Court has been asked to rule on the consistency of a national measure both with the provisions of the Treaty relating to the right of establishment and with those concerning capital, it has held that once the right of establishment has been found to have been breached it is no longer necessary to examine the national provisions at issue in the light of the articles concerning capital. It follows, implicitly but necessarily, that the possibility of the national rules being consistent with the free movement of capital has been held irrelevant by the Court. Thus, such consistency would not be sufficient to justify a breach of the right of establishment.

45. Nor am I convinced by the argument based on the need to prevent the erosion of the tax base or close a tax loophole. The settled case-law of the Court shows that such economic considerations may not be relied on to justify a restriction on a fundamental freedom of Community law, such as freedom of establishment.

46. In various judgments,[10] the Court has expressly held that 'reduction in such tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom'.[11]

47. As regards the possibility of justifying the discrimination at issue in this case on the grounds that it is intended to prevent tax evasion or abuse of the freedoms conferred by Community law, the following remarks are called for.

48. Unlike the considerations just examined, the prevention of tax evasion and the need for fiscal control are indeed overriding public interest requirements which could in principle justify restrictions on freedom of establishment.

9 — See, *inter alia*, the judgments cited above, namely, *X and Y*, paragraph 30, *Baars*, paragraph 42 and *Metallgesellschaft and Others*, paragraph 75.

10 — In the aforementioned judgment in *Metallgesellschaft and Others*, paragraph 59, and likewise in the judgment of 16 July 1998 in Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 28.

11 — Judgment of 6 June 2000 in Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 59.

49. However, it follows from the settled case-law [12] of the Court that, for such justification to be upheld, not only should the measure in question be of such a nature as to ensure the achievement of its aim, it should also not restrict fundamental freedoms of Community law any more than is necessary for that purpose.

50. It does not seem to me that this proportionality requirement is met in this particular case. As the Commission also points out, the national rule at issue, which treats less favourably any transaction involving a foreign element, is tantamount to presuming evasion or abuse as soon as a transaction involves a company established in another Member State, or even a Swedish company with a natural person established in another Member State as a shareholder.

51. This situation is inconsistent with the settled case-law, according to which the authorities of a Member State may not assume the presence of evasion or abuse simply because an operator has exercised a freedom under the Treaty. [13]

12 — See, for example, the judgment of 15 May 1997 in Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 26.

13 — Judgments of 9 March 1999 in Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 27 and in the aforementioned *Metallgesellschaft* case, paragraph 57.

52. I note with some surprise the Riksskatteverket's suggestion that this is a case of attempted fraud. I fail to see how the mere fact that X and Y resorted to the preliminary decision procedure can be regarded as an indication of an intention to evade tax, especially as the purpose of such a decision is to enable the taxable person to assess in advance the tax implications of the operation he has in mind.

53. In any event, it would be for the national court — which, however, in its order for reference, makes no allusion to this issue — to rule on this point.

54. It follows from the explanations provided at the hearing by the Swedish Government itself that the purpose of the measure is to prevent the transferor of the shares from evading Swedish tax on the gain by moving abroad. Thus, the measure is clearly disproportionate to its objective.

55. Indeed, the transferor is denied the benefit of deferred taxation even if he does not leave Sweden and, moreover, even if the transferee company is Swedish. Thus, the benefit may be denied even if both the transferee and the transferor remain in Sweden and the tax authorities could turn to either to obtain payment of the tax.

Moreover, it is hard to see how the fact that the Swedish transferee company has one or more shareholders established in another Member State prevents the Swedish authorities from assessing that company for the tax in question.

56. Thus, in my opinion, while the lack of proportionality seems obvious in a case such as this in which both the transferor and the transferee remain in Sweden, it is also present where the transferee company is established in another Member State.

57. While it is true that this is not the situation at issue in the main proceedings, such a situation is also covered by the national measure on which the Court has been asked for a preliminary ruling by the referring court, whose task it is to assess both the necessity and the relevance of the question posed.

58. I therefore consider it appropriate to make the following observations.

59. Even if the transferee company is established in another Member State, the tax collection problem cited by the Swedish Government will only arise if the transferor leaves Sweden. Thus to be consistent with the principle of proportionality a measure should apply only to individuals who actually leave the national territory, for example, through a guarantee scheme designed to ensure that tax is not evaded, as suggested by the Commission.

60. Moreover, as the EFTA surveillance authority pertinently observes, the Swedish legislation makes no distinction according to the tax burden of the transferee company in its country of establishment nor according to whether the transferor is the sole shareholder or a majority or minority shareholder in the foreign transferee company.

61. Clearly, the probability, and even the possibility, of evasion or purely artificial arrangements will vary significantly depending on these considerations. Accordingly, a proportionate measure should take them into account.

62. Thus, the disproportionate nature of the national measure at issue means that it cannot be regarded as justified by the need for fiscal control.

63. It remains to consider the argument based on the need to safeguard the cohesion of the Swedish tax system.

64. In this respect, I share the scepticism of the Commission with regard to the relevance of this concept in this particular case. It is hard to see how a measure that discriminates between transferees according to their place of establishment or that of their shareholders could be considered essential to the cohesion of the system on the grounds that precautions need to be taken against the risk of the transferor leaving the country.

65. I am forced to conclude that in reality, in the present case, this concept seems intended to meet the need for fiscal control, which I have just examined.

66. Moreover, there is an important difference between the case which forms the subject of the main proceedings and *Bachmann*, which is relied on by the Kingdom of the Netherlands and the Riksskatteverket. In the latter, there was a likelihood of the beneficiary of the insurance payments leaving the national territory, thus breaking all links between that territory and the performance of the insurance contract, since the insurance company was established in another Member State. On the other hand, in the present case, as the Riksskatteverket itself, in another context, has already pointed out, the economic activity to which the transaction relates continues to be carried out in Sweden, with whose territory the assets contributed, namely shares in a Swedish company, continue to be linked.

67. It follows that, in contrast to *Bachmann*, in a case such as that envisaged by the national measure at issue the beneficiary of the transfer never entirely escapes the Swedish tax net since, even if established abroad, the transferee company holds shares in a Swedish company. This applies *a fortiori* when, as in the case before the national court, the transferee is itself a Swedish company.

68. Moreover, in *Bachmann*, a national legislative provision, to which the Court attached decisive importance, explicitly provided for the non-taxation of sums paid by the insurance company when the contributions were non-deductible. In the present case, there is no equivalent provision expressly linking the advantage of deferred payment of tax to cases in which it is certain that tax would eventually be collected.

69. It is also necessary to bear in mind the case-law of the Court according to which the cohesion of the tax system does not necessarily have to be ensured within a

purely national context. Possible double taxation agreements should also be taken into account. [14] It follows from the information provided during the hearing that the double taxation agreement between the Kingdom of Belgium and the Kingdom of Sweden, which entered into force on 24 February 1993, could be relevant in so far as it divides the taxation of capital gains between the two contracting States. The same is probably true of other agreements of this type between the Kingdom of Sweden and other Member States.

70. Hence, given the effects of these agreements, which generally make it possible to prevent situations in which, as a result of a change of domicile, there is no longer any government empowered to tax gains, there would appear to be no substance to the claim that the national measure at issue is necessary to preserve the cohesion of the tax system.

71. In any event, the case-law shows that, for this to be the case, the national measure in question must observe the principle of proportionality in not going beyond what is necessary to safeguard the cohesion of the tax system. [15] For the reasons given in connection with the argument based on the need for fiscal control, I consider, *mutatis mutandis*, that the national measure at issue restricts the right of establishment beyond what would be justified by the need to preserve the cohesion of the tax system.

72. Accordingly, that argument in favour of the national measure concerned should also be rejected.

73. It follows that this measure unjustifiably restricts the freedom of establishment conferred by Community law.

Free movement of capital

74. In view of the case-law of the Court cited above, according to which if a national measure is inconsistent with the right of establishment there is no need to examine it in relation to the free movement of capital, it is my opinion that it is unnecessary, in this particular case, to reply to the question submitted for a preliminary ruling in so far as it concerns Articles 56 EC and 58 EC.

75. Thus, it is only for the sake of completeness that I propose to explain why the national measure at issue cannot be considered consistent with the free movement of capital either.

14 — Judgments of 11 August 1995 in Case C-80/94 *Wielockx* [1995] ECR I-2493 and in the aforementioned *Bachmann* case, paragraph 26.

15 — Cf. the *Bachmann* judgment, cited above, paragraph 27.

76. There can be no disputing the fact that the free movement of capital has been restricted, since the Swedish law is liable to deter an investor established in Sweden from contributing shares to a company established in another Member State, as he would then be deprived of the benefit of deferred taxation that he would have were he to make a contribution to a company established in Sweden. Moreover, it is also liable to deter a foreign operator from investing in a Swedish company since that company would then have a shareholder established in another Member State and investors established in Sweden might therefore be deterred from contributing capital to it.

77. There is no doubt that these are movements of capital within the meaning of Community law.

78. It is to no avail that the Riksskatteverket invokes Article 58 EC.

79. In this respect, it should be noted that, by virtue of Declaration No 7 annexed to the Maastricht final act, national provisions forming the proper subject of Article 73d(1) of the EC Treaty (now Article 58(1) EC) must have existed at the end of 1993, whereas the national measure at issue was introduced after that.

80. Moreover, in any event, Article 58(3) EC states that such national provisions are not to constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments and hence should comply with the principle of proportionality.

81. For the reasons mentioned above, it appears that this condition is not fulfilled in this particular case.

82. It must therefore be concluded, in the alternative, that the provisions of the Treaty relating to the free movement of capital preclude legislation such as that at issue in this case.

83. In the light of the above, the answer to the question submitted by the Regeringsrätten should be that:

'In a situation such as that in the present case, Articles 43 EC to 48 EC preclude the application of a Member State's legislation which — like the relevant Swedish legislation — has the effect that a capital contribution in the form of a transfer of shares at undervalue is taxed less advantageously if the contribution is to a legal person which is domiciled in another Member

State and in which the transferor directly or indirectly has a holding or to a domestic limited company in which such a legal person has a holding, than would have been the case if there had been no such foreign proprietorial interests.'

IV — Conclusion

84. For the reasons set out above, it is proposed that the Court should rule as follows:

In a situation such as that in the present case, Articles 43 EC to 48 EC preclude the application of a Member State's legislation which — like the relevant Swedish legislation — has the effect that a capital contribution in the form of a transfer of shares at undervalue is taxed less advantageously if the contribution is to a legal person which is domiciled in another Member State and in which the transferor directly or indirectly has a holding or to a domestic limited company in which such a legal person has a holding, than would have been the case if there had been no such foreign proprietorial interests.